

Assarian Electric Company and Local 103, International Brotherhood of Electrical Workers, AFL-CIO. Case 1-CA-28412

February 14, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge and amended charge filed by Local 103, International Brotherhood of Electrical Workers, AFL-CIO, the Union, on June 28 and August 8, 1991, the General Counsel of the National Labor Relations Board issued a complaint on August 13, 1991, against Assarian Electric Company, the Respondent, alleging that it has violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. Although properly served copies of the charge, amended charge, and complaint, the Respondent has failed to file an answer.

On November 18, 1991, the General Counsel filed a Motion for Summary Judgment. On November 22, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion For Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the General Counsel notified the Respondent by certified letter dated October 22, 1991, of its obligation to file an answer to the complaint and that unless an answer was received by November 1, 1991, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Springfield, Massachusetts, has

been engaged as an electrical contractor in the construction industry. During the calendar year ending December 31, 1990, the Respondent, in the course and conduct of its business operations performed services valued in excess of \$35,000 for various enterprises located in States other than the Commonwealth of Massachusetts; performed services valued in excess of \$20,000 for Fisher Development Company, an enterprise performing business within the Commonwealth of Massachusetts and that is directly engaged in interstate commerce; and purchased and received at its Massachusetts jobsites and facility goods and materials valued in excess of \$5000, which were shipped directly from sources outside the Commonwealth of Massachusetts.

The Electrical Contractors Association of Greater Boston, Inc., Boston Chapter, National Electrical Contractors Association (the Association) has been an organization composed of employers, including the Respondent, engaged in the construction industry, and which exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. During the calendar year ending December 31, 1990, the employer-members of the Association collectively purchased and received at their facilities within the Commonwealth of Massachusetts products, goods, and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, that the employer-members of the Association are employers, collectively, engaged in commerce within the meaning of Section 2(6) and (7), and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Unit and the Union's Representative Status*

On September 1, 1989, the Association and the Union entered into a collective-bargaining agreement which, by its terms, is effective for the period September 1, 1989, through August 31, 1991.

On May 22, 1991, the Respondent, by its president, Nelson A. Assarian, entered into a "Letter of Assent-A" which authorized the Association to represent it for purposes of collective bargaining and bound the Respondent to the terms and conditions of employment of the 1989-1991 agreement.

All employees of the Respondent in the following classification constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees performing electrical installation or repair work, as set forth in the 1989–1991 Agreement, employed by employer-members of the Association, and of the employers who have authorized said Association to bargain on its behalf, including Respondent, but excluding guards and supervisors as defined in the Act.

At all times material, the Union, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of the Respondent's employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

B. The Violations

Since about June 27, 1991, the Respondent has failed and refused to pay the following fringe benefit funds amounts that have become due under article IV of the 1989–1991 collective-bargaining agreement including, but not limited to:

National Electrical Benefit Fund—Article 4.1
 Health & Welfare Fund—Article 4.2
 Local 103 Pension Fund—Article 4.3
 Holiday, Vacation and Supplementary
 Unemployment Fund—Article 4.4
 Deferred Income Fund—Article 4.5
 Working Assessment—Article 4.6
 National Electrical Industry Fund—
 Article 4.7¹

These subjects relate to the wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining. Accordingly, we find that the Respondent, by failing to make the payments, has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

Since about June 27, 1991, the Respondent has refused to adhere to and has repudiated the entire 1989–1991 agreement by its refusal to follow the referral procedure pursuant to article V of the 1989–1991 agreement and its withdrawal of recognition from the Union.

¹ The complaint alleges an unlawful failure to make contributions to the National Electrical Industry Fund. The complaint gives no further information concerning this fund. On its face, the National Electric Industry Fund appears to be an industry advancement fund, and in the absence of evidence to the contrary, we shall consider it as one. The Board has held that an industry advancement fund is not a mandatory subject of bargaining. *Scott Lee Guttering Co.*, 295 NLRB 497 fn. 3 (1989). The Respondent's failure to make these contributions, therefore, does not violate Sec. 8(a)(5) of the Act. Thus, the Respondent is not required by our Order to make contributions to this fund.

By the above-described conduct, the Respondent has failed and refused to bargain collectively and in good faith with the representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

About June 27, 1991, the Respondent laid off or discharged the following employees: Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey. These employees were discharged or laid off because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection. These employees were laid off or discharged in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

By this conduct, the Respondent has discriminated, and is discriminating, in regard to the hire and tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By failing and refusing to continue in full force and effect all the terms and conditions of its collective-bargaining agreement with the Union by failing and refusing to remit contributions due various benefit funds, and by repudiating the entire 1989–1991 agreement by refusing to follow the referral procedure pursuant to the agreement and by withdrawing recognition from the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By laying off or discharging its employees because they had joined, supported, or assisted the Union and had engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in those activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall, inter alia, order the Respondent to adhere to the terms and conditions of employment of the agreement with the Union and to make whole the benefit funds, in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), for the contractually required payments to the funds that it has unlawfully failed to make. The Respondent shall

also reimburse its unit employees for any expenses ensuing from the Respondent's unlawful failure to make those payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall also order the Respondent to offer Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make each of them whole for any loss of earnings and other benefits suffered because of their layoffs or discharges, to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *New Horizons for the Retarded*, supra.

To remedy the violation that the Respondent has failed to comply with referral procedures set forth in the contract, we leave to compliance the determination of the extent of the relief, if any, that is appropriate beyond the requirement that the Respondent cease and desist from failing to comply with these procedures and its affirmative corollary.

ORDER

The National Labor Relations Board orders that the Respondent, Assarian Electric Company, Springfield, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 103, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Failing and refusing to continue in full force and effect all the terms and conditions of its collective-bargaining agreement with Local 103, International Brotherhood of Electrical Workers, AFL-CIO, effective September 1, 1989, through August 31, 1991, by failing to remit contractually required fringe benefit contributions, and by refusing to follow the referral procedure pursuant to article V of the 1989-1991 agreement and by withdrawing recognition from the Union.

(c) Laying off or discharging or otherwise discriminating against employees because they join, support, or assist Local 103, International Brotherhood of Electrical Workers, AFL-CIO or any other labor organization, or engage in other activities for the purpose of collective bargaining or other mutual aid or protection.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize the Union and adhere to the terms and conditions of its 1989-1991 collective-bargaining agreement with the Union, including but not limited to, its provisions governing benefit fund contributions and referral procedures.

(b) Make whole the benefit funds, in the manner set forth in the remedy section of this decision, for the contractually required contributions to the benefit funds that the Respondent has unlawfully failed to make.

(c) Make whole the unit employees, in the manner set forth in the remedy section of this decision, for any losses suffered, including those occurring as a result of the Respondent's failure to make the contractually required fringe benefit fund contributions.

(d) Offer employees Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered by reason of the layoffs or discharges, in the manner set forth above in the remedy section of this decision.

(e) Remove from its personnel files any reference to the layoffs or discharges of Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey and notify them in writing that this has been done and that evidence of these unlawful layoffs or discharges will not be used as a basis for future personnel actions against them.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(g) Post at its jobsites and facility in Springfield, Massachusetts, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the no-

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with Local 103, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT fail and refuse to continue in full force and effect all the terms and conditions of our collective-bargaining agreement with Local 103, International Brotherhood of Electrical Workers, AFL-CIO, effective September 1, 1989, through August 31, 1991, by failing to remit contributions due various benefit funds, by refusing to follow the referral procedure pursuant to article V of the 1989-1991 agreement, and by withdrawing recognition from the Union.

WE WILL NOT layoff, discharge, or otherwise discriminate against you because you join, support, or assist Local 103, International Brotherhood of Electrical

Workers, AFL-CIO or engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize Local 103, International Brotherhood of Electrical Workers, AFL-CIO as the collective-bargaining representative for all our employees performing electrical installation or repair work and WE WILL adhere to the terms and conditions of our 1989-1991 collective-bargaining agreement with the Union, including but not limited to, its provisions governing benefit fund contributions and referral procedures.

WE WILL make the contractually required benefit fund contributions that we unlawfully failed to make.

WE WILL make whole, with interest, employees in the appropriate bargaining unit represented by the Union and covered by the agreement for any losses suffered as a result of our failure to make the required benefit fund payments.

WE WILL offer Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their layoffs or discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful layoffs or discharges of Paul Chani, Michael O'Connor, Bruce Singer, and Thomas Bailey and notify each of them, in writing, that this has been done, and that evidence of these unlawful acts will not be used as a basis for future personnel actions concerning them.

ASSARIAN ELECTRIC COMPANY